

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

KOKOSING MATERIALS, INC.

Employer

and

Case No. 8-RC-16675

INTERNATIONAL UNION OF OPERATING
ENGINEERS, Local 18, 18A, 18B, 18C and 18RA,
A/W INTERNATIONAL UNION OF OPERATING
ENGINEERS AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.¹

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time employees employed by the Employer, including ground men, loader operators, plant operators, terminal employees, the terminal manager, maintenance employees and the scrap employee employed at the Employer's facilities in Columbus, Delaware, Fredericktown, Mansfield, Medina, Sheffield, St. Louisville, Westernville, Wooster, and Wheelersberg, Ohio and the Hawkeye, Volunteer and Wolf Pack portable facilities, but excluding quality control employees, plant managers, office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

¹ The parties filed post-hearing briefs, which have been carefully considered. Upon the entire record in this proceeding, the undersigned finds: the hearing officer's rulings made at the hearing are free from prejudicial errors and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purpose of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

The record indicates that there are approximately 39 employees in the Unit.

I. Issues

The Petitioner seeks a unit of essentially all of the Employer's employees working throughout its operations.² The employees sought to be included in the unit work at the Employer's nine permanent asphalt plants and three portable asphalt plants all of which manufacture hot mix asphalt, as well as at two terminals where liquid asphalt is off-loaded from barges, trains and trucks and stored for shipment to the plants. The Employer argues that an overall unit is inappropriate; that employees at each facility comprise separate bargaining units; and that in any event, neither portable plant employees nor terminal employees should be included in the same unit with permanent plant employees.

The parties also disagree over the voting eligibility of plant managers and the terminal manager -- the Employer, contrary to the Petitioner, taking the position that they are supervisors. The Employer has further raised the possibility that the plant operators may be supervisors, but takes no position on the issue. The Petitioner contends that that plant operators are not supervisors. The Employer also employs quality assurance employees, but it appears neither party contends that they should be included in any unit found appropriate. Finally, the parties expressed no opinion with respect to the unit placement of certain maintenance employees and the scrap employee.

II. Decision Summary

For the reasons set forth in detail below, I find that a unit consisting of all of the Employer's employees, employer-wide, with the exception of the quality control employees and office clericals, constitutes an appropriate unit for purposes of collective bargaining. Based on their authority to responsibly direct employees in their work and assign them to different positions/locations, I further find that the plant managers are supervisors and therefore ineligible to vote in the election directed herein. With respect to the terminal manager, I conclude that the Employer has not met its burden to establish any supervisory authority on his part and therefore include him in the Unit. I do not believe that the plant operators' possible supervisory status has appropriately been placed in issue, and in the absence of any clear evidence that they are in fact supervisors I shall include them in the Unit. I have further included the maintenance employees in the Unit due to their clear, overwhelming community of interest with unit employees. I conclude that the scrap employee should also be included in the Unit because there is no other unit in which he may appropriately be included. Finally, in apparent agreement with the parties, I exclude the quality control employees, who do not appear to have any substantial community of interest with unit employees.³

² The petition does not itself include a unit description encompassing all of the Employer's operations. However, both at the hearing in this matter and in its brief the Petitioner made clear that it was in fact seeking a unit covering all of the Employer's facilities.

³ The issue of office clericals was not raised in this proceeding other than including two in an overview meant to set forth all of the Employer's personnel. While neither party expressed an opinion as to their unit placement, I note that, absent an agreement of the parties, office clericals are not included in units with other employees. See, *Kroger*

III. Background

A. The Employer's Operations and Employee Complement:

The Employer's headquarters are located in Fredericktown, Ohio. The Employer manufactures hot mix asphalt utilized in surface paving. Sixty-five to seventy percent of its production goes to an allied corporation – Kokosing Construction. The remainder of its production is sold to other enterprises and municipalities.

The hot mix asphalt is manufactured at nine plants roughly grouped around Interstate 71 between Columbus and Akron, Ohio. They are located in the Ohio communities of Columbus, Delaware, Fredericktown, Mansfield, Medina, Sheffield, St. Louisville, Westerville and Wooster. The Employer also manufactures hot mix asphalt at three portable plants. As the name would suggest, these three plants are moved from site to site and service a single project wherever one is placed. Rather than being referenced by location, the portable plants are designated by collegiate athletic team nicknames; i.e., the Hawkeye, Volunteer and Wolf Pack plants. Whereas the permanent plants can handle various blends of asphalt mix and have multiple silos to hold different mixtures, a portable plant has only one silo and produces only the mixture needed for the specific project that it is servicing. Each plant is commonly staffed by a plant manager or plant operator, a loader operator and a ground (sometimes referred to as an outside) "man" who appears to function as a general laborer. At certain times a plant may have more personnel (especially if it is working two shifts), and one plant has an additional ground man because, unlike other plants, it receives certain of its raw material on railcars. The plants generally shut down around Thanksgiving. The loader operators and ground men are laid off for the winter months, but the plant managers and operators are kept on, apparently to do maintenance work at the plants.

The asphalt mix produced by the Employer is a combination of aggregate (apparently crushed rock) and liquid asphalt cement (a petroleum derivative that acts as a binding agent for the aggregate). In some instances, a material referred to as "RAP" is also included in the mix. RAP is an acronym for Recycled Asphalt Pavement -- a substance consisting of old asphalt pavement that has been removed from a road or parking surface.

The process of manufacturing the asphalt paving at a plant begins with the plant manager or operator advising the loader operator as to the type of aggregate needed for the particular blend of hot asphalt mix to be produced. The loader operator fetches the appropriate aggregates with his loader and dumps them into what are referred to as "coal feed bins." The bins are comprised of separate compartments that hold individual aggregate types that are utilized to make the mix. The equipment that performs the mixing is calibrated and controlled by the plant manager or operator from inside the plant utilizing a computer that is programmed to add various percentages of different aggregates.

Co., 204 NLRB 1055 (1973); *L.M. Berry & Co.*, 198 NLRB 217, 219 (1972). Since the parties have not affirmatively sought to include the clericals, I have excluded them from the unit.

The aggregate mixture is dropped on a belt that transports the aggregate upwards where it enters the top end of a rotary drum that incorporates a burner at the lower end. The aggregate dries as it travels down the drum. At some point in the process liquid asphalt cement and, if required, RAP enter the drum. The finished product is put on a conveyor and conveyed to storage silos that vary in size from 200-ton to 300-ton capacity. The product is dispensed to customers' trucks from the storage silos.

Basic upkeep and maintenance of the plants is performed by plant personnel. They on occasion, as explained in more detail below, are assisted or assist maintenance employees who come to the plant for larger or more complicated maintenance.

There are two terminals where the liquid asphalt that comprises the asphalt cement is received and stored for as-needed shipment to the plants. One is located in Wheelersburg, Ohio on the Ohio River. This facility off-loads the liquid asphalt from barges into tanks. The other facility is located in a rail yard in Mansfield, Ohio. This facility off-loads the liquid asphalt primarily from rail cars, but also from trucks. There is one manager over the terminals, Jerry Estep, who works primarily out of his Mansfield office. He will, however, also spend time in Wheelersburg. One other employee works in Mansfield, two in Wheelersburg. The two Wheelersburg employees may each work a different shift, depending upon the workload. The terminal employees, in addition to off-loading and loading trucks, are responsible for basic maintenance and terminal upkeep. They will also on occasion perform a viscosity test of the asphalt to make certain that they are shipping the correct liquid asphalt to a plant. The Employer contracts for the transport of the liquid asphalt from the terminals to the plants by truck.

There are generally two maintenance employees, although a third employee who is transitioning to this classification from a plant operator's position now assists them. These individuals work out of a maintenance building in Westerville, Ohio, a city that is also the location of a plant. It is unclear whether the maintenance building is located on the same grounds as the plant. The maintenance employees will erect certain structures at plants, fabricate components and help plant personnel with the larger maintenance projects. They may also perform winter maintenance during the seasonal shut down, but are subject to being laid off.

The Employer also employs a scrap employee.⁴ The scrap employee is a retired employee who was brought back to cut up and salvage presumably metal scrap. He apparently performs this work at various locations. It is unclear if he works out of any particular location or who supervises him.

The Employer has a Quality Control Department comprised of a quality control director, Kevin Davis, and an indeterminate number of employees. It is unclear where this department is located. Davis will dispatch his personnel to the various plants to perform quality control tests on the hot mix asphalt. In addition they may be sent to perform tests at the site where the asphalt is being used as paving.

⁴ Although the Employer's president testified that the name of the scrap employee is Bob Snyder, one exhibit lists the single scrap employee as Robert Ray Reamsnider. I am therefore uncertain of the scrap employee's actual name.

B. *The Employer's Management Hierarchy:*

As noted above, the Employer's headquarters are located in Fredericktown, Ohio, but not at the site of the Fredericktown plant. It appears that some of office clericals work in headquarters along with the Employer's higher-level management. The Employer's supervisory hierarchy is headed by President Robert Bailey. Working directly under Bailey are General Manager Trent Baldwin, Environmental/Sales Person Ralph Kyanko, Quality Control Director Kevin Davis, Operations Manager Brian Pearce and a safety officer.

Pearce is head of field operations. Reporting to him is Assistant Operations Manager David Arnold. Plant managers and operators report to Pearce and Arnold. The terminal manager reports to Kyanko whose office, rather than being located in Fredericktown, is located in Mansfield.

IV. Analysis of Scope of the Unit Issue

It is true that single location units, as advocated by the Employer, are presumptively appropriate. *Trane, an Operating Unit of American Standard Companies*, 339 NLRB No. 106 (2003). However, it is well settled that the single facility presumption only applies when a petitioner has requested a single facility unit. As the Ninth Circuit explained in *NLRB v. Carson Cable TV*, 795 F.2d 879, 887 (9th Cir., 1986), "where, as here, the union requests and the Board designates a multi-location unit as appropriate, the presumption simply has no application. The presumption does not preclude designation of a larger unit, but only works to assure that a Board determination that a smaller unit is appropriate will almost never be challenged." Indeed, the Act does not require that the unit for bargaining be the only appropriate unit, or the ultimate unit, or even the most appropriate unit; the Act requires only that the petitioned-for unit be appropriate. *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). Although not dispositive, a petitioner's unit desire is a relevant consideration. *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964).

The unit sought by the Petitioner covers all locations of the Employer's operations at which employees in the classifications sought to be included work. An employer-wide unit is presumptively an appropriate unit. See, e.g., *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998); *Montgomery County Opportunity Board, Inc.*, 249 NLRB 880, 881 (1980). Although all employees of the Employer are not included in the unit sought by the Petitioner -- the Petitioner is not seeking to include quality control employees -- the presumptive appropriateness of employer-wide units involves the concept that unit employees in all of an employer's multiple locations are to be included and applies even if certain classifications of employees are excluded. See, e.g., application of the presumption in *Acme Markets, Inc.*, 328 NLRB 1208 (1999) (only employees sought were pharmacy managers, staff pharmacists, and "undistributed" pharmacists, who were employed in a chain of retail supermarkets' pharmacy areas); *Western Electric Company*, 98 NLRB 1018 (1952) (only technical/professional employees sought who worked for a company that procured, produced, distributed and installed telephone system equipment). Finally, even if the unit sought by the Petitioner were not considered employer-wide due to the exclusion of the quality control employees, it is well settled that there is more than one way in

which employees of a given employer may be appropriately grouped for purposes of collective bargaining. *Overnite Transportation Co.*, supra.

In any event, whether the analysis is one involving the Employer attempting to overcome the presumption that the unit sought is appropriate or one involving the Petitioner seeking to establish that the unit sought is appropriate irrespective of any presumption, the criteria examined in either case revolves around community of interest standards. The Board considers a number of factors in determining whether a community of interest exists among employees sought to be represented. In determining whether a petitioned-for multi-location unit is appropriate, the Board evaluates the following factors: employees' skills and duties; terms and conditions of employment; employee interchange; functional integration; geographic proximity; centralized control of management and supervision; and bargaining history. See, *Laboratory Corp. of America Holdings*, 341 NLRB No. 140 (2004); *Bashas' Inc.*, 337 NLRB 710 (2002); *Alamo Rent-A-Car*, 330 NLRB 987 (2000). See also, *NLRB V. Carson Cable TV*, 795 F.2d at 884. I shall consider each of these factors separately.

A. Employees' Skills and Duties:

It appears that in general terms there is little, if any, difference between the skill and duties of the rank-and-file employees at the various plants. While the terminal employees apparently perform a different function than employees at the plants, it does not appear that their skills and duties are dramatically different from those of plant employees. This conclusion is bolstered by the fact, as noted in more detail below, that employees from the plants may on occasion be sent to work at one of the terminals.

B. Terms and Conditions of Employment:

Except for the plant managers, whom I am excluding from the unit as supervisors, all employees sought to be included in the unit are hourly employees. All hourly employees of the Employer have the same benefit package, which includes life insurance and vacation. While there apparently is no set wage scale, wage determinations for all employees involved in this matter are ultimately made by management personnel at headquarters based on such factors as whether the employee works at a larger volume plant, whether he is cross trained, how well he maintains his equipment, the opinion of his plant manager and the like. The only exception to this is if a portable plant is assigned to an Ohio Department of Transportation project, the workers at the plant will receive the prevailing wage rate set for state funded projects. It is unclear if this is markedly different from their normal wage rates.

The hours worked at all plants are dictated to a large extent by customer's needs. Rank-and-file employees at all plants are laid off in the winter.

C. Employee Interchange:

In most cases when a loader operator or ground man is initially hired they are not hired for a specific plant, but hired and thereafter placed according to need. After being placed at a particular facility they can be permanently or temporarily transferred. In this regard, all job

descriptions appearing in the record indicate that an employee in the classification described must be willing to travel. It appears that temporary transfer of employees, based on production needs or the absence of regular employees due to illness, occur frequently. There are at least five employees who with some regularity work at locations other than where they are stationed. One hourly plant employee in particular is on occasion sent to the terminals. Permanent transfers also appear to occur with some regularity, especially as employees change classifications. An example of a recent transfer is that of a former plant operator who now works with the two maintenance employees.

D. Functional Integration:

Each plant and terminal have two-way radios. The plants and terminals will communicate on a regular basis concerning deliveries of liquid asphalt from the terminals. The plants may communicate with each other on such issues as the need to borrow a worker. If there is an issue with a particular product at one plant, a customer may be sent to a different plant where the product is available. The maintenance employees perform work at all facilities.

E. Geographic Proximity:

Except for the Ohio River terminal, as noted previously, all the Employer's permanent facilities are roughly grouped around the I-71 corridor between Columbus and Akron, Ohio with the Fredericktown headquarters in the center of the grouping. The plants are evidently in close enough proximity to, as noted above, borrow personnel on a temporary basis, be serviced by the same maintenance employees and be periodically visited by management staff from Fredericktown.

F. Centralized Control of Management and Supervision:

With the exception of the day-to-day direction of employees by plant managers, as discussed below, almost all aspects of the Employer's operations are centrally controlled. The hiring of employees and the setting of employees' wages and benefits is done by headquarters personnel. Although on occasion two plant managers may themselves agree to the short-term assignment of an employee to a different plant, transfers are for the most part arranged at headquarters. Payroll is handled centrally. Promotions of employees are decided by headquarters personnel. Terminations are ultimately determined by headquarters personnel. Negotiations for the purchase of material utilized in the production process are performed by headquarters personnel. Quality control is centrally handled. Although broken down by facility, bookkeeping is done centrally.

G. Bargaining History:

There is apparently no bargaining history affecting any of the employees involved in this matter.

Taking into consideration all of the above, but especially noting the identical benefits of the hourly employees, the permanent and temporary transfer of employees between facilities and

the highly centralized nature of the management of the Employer's operations, I find that the employer-wide unit sought by the petitioner is an appropriate unit for collective bargaining. This includes not only the portable plant employees who are undifferentiated in any material way from the permanent plant employees, but also the terminal personnel who share benefits with other employees and on occasion borrow an employee from the plants. I also note that the terminals are integrated into the plants' operations as a consequence of being the source of the liquid asphalt needed to operate the plants.

V. Analysis of the Supervisory Issues

There were three classifications raised by the Employer at the hearing in this matter as possibly being supervisory positions.⁵ These are the plant managers, plant operators and terminal manager. As previously noted, the Employer contended at the hearing and in its brief, contrary to the Petitioner, that the plant managers and terminal manager are supervisors within the meaning of the Act. With regard to the plant operators, the Employer's president, during his testimony, concurred with Petitioner counsel that they are not supervisors. Employer counsel, however, declined to agree that the plant operators were employees and instead opined that the issue should be resolved by me.

A. The Legal Standard:

Before analyzing the specific duties and authority of the individuals in issue, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp.*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-*

⁵ Although not specifically addressed by the parties, it is assumed that they agree that management personnel above the level of plant managers are supervisory employees within the meaning of the Act.

Cola Co., 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 949 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB No. 99, slip op. at 2 (2003); *Michigan Masonic Home*, 332 NLRB at 1409. As a general matter, I observe that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that the supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

B. *The Plant Managers:*

There are currently eight plants, two of which are portable plants, overseen by plant managers rather than plant operators. The plant managers formulate a Morning Action Plan (MAP) each evening for the next day by communicating with customers concerning their needs and developing a plan for meeting those needs. The plant manager will set the next day’s starting time for plant employees based upon the needs of the customers. If he believes it to be more advantageous, he can stagger the starting and ending times of the employees -- bringing one employee in earlier and letting him leave earlier than the other plant employee. Each morning the plant manager will hold a MAP meeting with the employees at his facility to explain what needs to be done that day; including advising them of the type of mix they will be producing, what sorts of materials will be needed for the mix, what time trucks are expected to be loaded and any other work that needs to be done. If it is a Monday morning, the plant managers are responsible to hold a safety meeting, following which employees are tested to assure their comprehension. The plant manager is to see that all employees attend the safety meeting.

During the work day plant managers are responsible for knowing what the plant employees are doing and if they are doing it properly. Employees will be instructed when the mix is to be changed and in the resulting work which flows from the change. The Plant Manager will enter mix designs into the computer which controls the plants functions. The computer is located in the plant manager’s office, which is in a raised area of the plant referred to as the control house. The computer will advise him concerning what parameters of a particular mix,

which need to be met -- such as how much asphalt cement is involved in the blend. He will monitor variances that occur in the mix and may have to “tweak” the formula by increasing or decreasing certain of the aggregates.

The plant manager will spend a part of his day dealing with customers and may convey certain instructions to their truck drives -- such as the route they need to use to approach a particular project. The plant manager will ascertain the plant’s need for raw material required for upcoming blends and may order aggregate from suppliers selected by headquarters personnel as well as liquid asphalt from the Employer’s terminals.

Based on the requirements of customers or needed work at the plant, the plant manager will decide when a plant worker’s day ends. A plant manager has the authority to decide whether a plant employee stays over in circumstances where the employee will be paid overtime, for example in a situation where maintenance is needed.⁶ A plant manager may allow an employee to come in late or leave early for personal reasons. The record indicates that one employee who was working a double shift was discovered asleep by a plant manager and sent home. While employees keep their own time cards, plant managers are responsible for verifying them, especially with respect to assuring that the correct codes were utilized indicating the type of work performed, before forwarding the cards on to headquarters.

An employee who is calling in sick phones the plant manager. Although it appears that generally the shifting of workers from one facility to another is done by the operations manager or assistant operations manager, two plant managers may coordinate between themselves to temporarily transfer an employee in a situation where additional manpower is needed.

It is somewhat unclear as to whether the Employer has any sort of formal disciplinary system. Employees with a perceived work deficiency may be admonished by a plant manager and the manager may write-up the employee. It is unclear, however, what sort of impact such a write-up has on the employee. It appears that some years ago, before the Employer began using an operations manager or assistant operations manager as a layer of supervision between the president and plant managers, that plant managers could themselves terminate employees. Now, however, they tell the operations manager or his assistant that they do not believe an employee should be kept on. A plant manager’s recommendation of discharge or other discipline is accorded “great weight” and there are a few examples in the record where a recommendation from a plant manager to dismiss someone was acted upon. However, it is estimated that recommendations of termination are followed only approximately 75 per cent of the time, the final determination being made by the operations manager. It is unclear whether it is the normal practice to investigate any reported employee malfeasance beyond what is conveyed to higher management by the plant managers.

⁶ The Petitioner cites to a transcript section where the operations manager appears to indicate that the plant manager has to check with someone else about overtime. The particular transcript section is somewhat ambiguous and garbled. Moreover, a plant manager’s ability to independently assign overtime is made clear in other portions of the transcript.

A plant manager may recommend someone for hire and the record reflects that certain recommended individuals may have been hired. It appears, however, that any employee may recommend someone for employment. Moreover, the Employer currently has a formal hiring process that begins with a representative who is not employed by the Employer screening employees, followed by an applicant being interviewed at headquarters. Since the prospective employee is sent to a plant to see if he is truly interested in the sort of work he may be performing, the plant manager there may offer some opinion on the individual, but the final decision to hire is not his. Although the record reflects that one employee was recommended by a plant manager and hired "without even filling out a resume," it appears that this situation may have predated the current formal hiring process and in any event there is no conclusive evidence that the employee was hired solely based on the plant manager's recommendation.

A plant manager may informally evaluate an employee, but there is no formal evaluation of the employees working under him. Nevertheless, a plant manager's opinion of an employee is one factor in determining an employee's raise, but not the only one. Plant managers also have an indirect impact on what an employee may hope to earn, because it is they who will allow a ground employee to train on the equipment of a loader operator (a more highly paid classification of employee), or train an employee in the use of a plant's controls -- a necessary step to move into a plant operator's position which in turn is the route to a plant manager's job. In certain situations a plant manager may instruct a ground man to operate a loader, or even, if the individual has the proper training, for one of the employees under the plant manager to handle the controls of the plant while the plant manager takes a break.

The plant manager is responsible not only for holding the Monday morning safety meetings and assuring that employees attend, but in general for safety around the plant. This includes assuring the safety of equipment, as well as overseeing such employee conduct as wearing safety belts and proper protective clothing, and preventing "hot-rodding" around the premises on equipment. At least one employee was written up over a safety related issue. Plant managers undergo special training in Occupational Safety and Health requirements.

The Employer's president will visit plants at least once a year to go over the operation of the plant from a financial perspective. He will go over areas where costs may be too high with the plant manager, with an eye to inducing the plant manager to exercise more control over such costs. A plant manager has the ability to attempt to limit costs through watching the amount of hours employees are working, controlling loss in the stock piles of material, controlling waste, limiting the purchase of small tools and the like.

Plant managers are salaried employees who do not receive overtime. It appears that all the individuals above them in the chain of command are salaried and all below them are hourly employees. Salaried employees participate in the Employer's profit sharing plan. Under the plan, points are awarded based upon the individual's salary, years of service and an evaluation of the individual's efforts and abilities. This is plugged into a formula resulting in an award of a certain amount of compensation.

Salaried employees' vacation and life insurance benefits are superior to that of hourly employees. Salaried personnel, unlike hourly, have a "Wellcare Package" -- a sum of money

available for such things as eye and dental care. The plant managers have disability insurance apparently not enjoyed by hourly employees. Plant managers are provided with a company truck and a gasoline credit card.

As previously noted, loader operators and ground men are laid off in the winter shut down; plant managers are not.

The plant managers are required to attend numerous meetings. A noteworthy one is a winter conference attended by “superintendent-type individuals” from Kokosing affiliated companies. At this conference work in progress and projects coming up for the next year are reviewed, as well as such matters as new programs and policies.

The Employer argues that the plant managers possess supervisory indicia involved with the authority to effectively recommend hire, the ability to effectively recommend discharge and/or the authority to discipline, and the authority to responsibly direct employees.⁷ The Employer also notes what is commonly referred to as “secondary indicia” of supervisory status to bolster its argument that plant managers are in fact supervisors. I shall address each of these contentions in turn.

1. The ability to effectively recommend hire:

I note that “[t]he Board has consistently applied the principle that authority to effectively recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Children’s Farm Home*, 324 NLRB 61 (1997). There is no clear evidence in the instant case that recommendations by plant managers, even one by a plant manager who may meet a prospective employee while the employee is touring his plant, results in the Employer automatically hiring the individual. In this regard, I note that under the current hiring system applicants are initially winnowed out by someone from outside the Employer and prospective employees are thereafter interviewed and evaluated by higher management. Thus, the Petitioner has not met its burden to establish that the plant managers effectively recommend hire. See, e.g., *So-Lo Foods, Inc.*, 303 NLRB 749, 775-776 (1991) (interviewing applicants, also interviewed by someone higher up in the chain of authority, did not establish supervisory authority); *World Theatre Corp.*, 316 NLRB 969 (1995) (fact that uncle recommended nephew’s hiring is not dispositive where other unit employees routinely recommended others for employment and the final hiring decision rested with the uncle’s supervisor).

2. The ability to discharge or otherwise discipline, or to effectively recommend such action:

⁷ In addition to arguing in its brief that these indicia of supervisory authority exist, the Employer further argues that the plant managers should be found to be supervisors because they “Determine Working Conditions For Their Employees.” This does not directly related to any indicia set forth in Section 2(11) of the Act. Much of what the Employer notes in this section of its brief appears to relate to either the plant managers’ direction of employees or is best characterized as secondary indicia.

The ability to give oral counseling/warnings or written warnings is not equated with discipline unless there is evidence that the actions are part of a progressive disciplinary system or otherwise work to impact detrimentally on an employee's wages or hours of work. See, e.g., *Willamette Industries*, 336 NLRB at 744; *Ken-Crest Services*, 335 NLRB 777 (2001). Although plant managers may orally counsel/warn employees and may issue write-ups, because the Employer did not provide evidence of these actions' impact on the employee or of a formal progressive disciplinary system, I am unable to conclude that the Employer has established that this authority constitutes the ability to discipline.

While there is evidence that certain plant managers have carried out the actual termination of an employee, there is no evidence that since the Employer implemented the operations manager or assistant operations manager positions any plant manager has done this on his own authority. Since the burden is on the Employer in this regard, I cannot conclude on the evidence before me that the plant managers may currently discharge employees on their own authority. See, *Dean & Delucia New York, Inc.*, 338 NLRB No. 159, slip op. 2 (2003). Moreover, with respect to any argument concerning effective recommendation, the record establishes that plant managers' recommendations of discharge are followed only 75 percent of the time.⁸ There is also nothing to indicate whether or not higher management ever makes any independent investigation of the employee's misconduct before making a determination as to whether to discharge the employee. In addition, much of the evidence surrounding these recommendations involved the plant managers complaining of deficiencies, such as the employee being habitually tardy. Such reportorial actions are not the same as recommending discipline. See, *Willamette Industries*, 336 NLRB at 744. Finally, nothing in the current job description of the plant managers indicates that they may discipline or discharge employees.

For the forgoing reasons, I conclude that the Employer has not established that the plant managers may discipline or discharge or effectively recommend such actions.

3. Responsible direction and assignment of employees:

As noted above, possession of any one of the indicia of supervisory authority set forth in Section 2(11) of the Act may lead to the conclusion that an employee is a supervisor -- assuming that the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. The Board, however, often conjointly analyzes the ability to assign work and to responsibly direct employees since it is frequently difficult to separate directing an employee to perform a job function from assigning him/her to a position where they will do it. See, e.g., *American Commercial Barge Lines*, 337 NLRB 1070 (2002); *Providence Hospital*, 320 NLRB 717, 727 (1996). I shall therefore consider the issue of employee assignments along with the ability of plant managers to responsibly and independently direct employees.

⁸ The Employer cites *Jamco*, 290 NLRB 896 (1989) as a case where an individual who was determined to be a supervisor made recommendations which were followed only 75 per cent of the time. While it is true that the individual's recommendations (in that case on hiring) were followed 75 percent of the time and the individual was determined to be a supervisor, his ability to make these recommendations was not one of the indicia upon which the determination of his status was based.

The term “responsibly direct” was added to Section 2(11) of the Act to encompass those individuals who do not exercise any of the other supervisory indicia, but who still manage a group of employees. See, 93 Cong. Rec. 46677-4678 (1947), 2 Leg. Hist. of the Labor Management Relations Act 1303-1304 (1947) (Sen. Flanders) (Leg. Hist.). It is therefore not an indicia amenable to any rote application nor will a single fact establish its existence. There are, however, certain factors found in Board case law dealing with the indicia of assignment and direction of work that appear in the instant case, which, in combination, lead me to conclude that the plant managers do in fact responsibly direct and assign employees in their work with independent judgment. These include that the plant managers are the highest individual in authority at their plants, responsible for making operational decisions to assure production at the plant and coordinating the activities of employees to accomplish this;⁹ set employee starting and ending times, may authorize an employee to come in late or leave early for personal reasons and generally set plant employees’ work hours;¹⁰ may independently authorize overtime;¹¹ may direct a ground man to operate a loader or an employee working under the plant manager to spell the plant manager for breaks based upon his assessment of their abilities;¹² and may, in response to the needs of a fellow plant manager, assign an employee to help out at another plant.¹³

The Petitioner argues in its brief that certain factors found in this case which I have relied upon in reaching my conclusion that the plant managers possess the independent ability to assign and responsibly direct employees, may also be found in cases where the individual in issue was determined not to be a supervisor. There is no one factor alone that leads me to my conclusion and it is always the case that it is a combination of duties and authority that establishes this indicia of supervisory status. With respect to the cases cited by the Petitioner in support of its argument, in *Vanport Sand and Gravel, Inc.*, 267 NLRB 150, 151 (1983), the activities of the individual involved “were circumscribed by [the company’s vice-president’s] specific instructions and [the employer’s] more general established policies and he exercised limited discretion in the performance of his lead man duties.” In the instant case, unlike *Vanport Sand and Gravel*, the plant managers appear to have great discretion in determining how the work of the plant is performed, in allowing employees to vary their work hours, in determining whether

⁹ See, e.g., *Chem Fab Corp.*, 257 NLRB 996, 997 (1981) (individual left in charge of second shift and exercised independent judgment was supervisor); *Dale Service Corp.*, 269 NLRB 924 (1984) (senior operators, when managers not present, were responsible for the operation of the plant and direction of the work force).

¹⁰ See, e.g., *Arlington Masonry Supply Inc.*, 339 NLRB No. 99 (2003) (maintenance supervisor set the hours of work for himself and the one other employee under him); *Lancet Arch Inc.*, 324 NLRB 191, 192 (1997) (foreman was supervisor where, among other things, he sent employees home when work was slow); *DST Industries*, 310 NLRB 957, 958 (1993) (two individuals’ ability to grant requests to take off early was a factor in finding them to be supervisors).

¹¹ See., e.g., *Arlington Masonry Supply Inc*, Id; *American Commercial Barge Line Co.*, 337 NLRB 1070, 1071 (2002); *Dale Service Corp.*, supra; *Outboard Marine Corp.*, 307 NLRB 1333, 1334 (1992)

¹² See., e.g., *Dale Service Corp*, supra. (senior operators had the authority to assign operators to specific tasks based in part on the senior operator’s assessment of the employees’ abilities and the expertise required).

¹³ See., e.g., *Great American Products*, 312 NLRB 962 (1993) (ability to move employee into another department a factor in finding supervisory status).

an employee is ready to operate a piece of equipment and in deciding to assign an employee to another plant that needs help.

Likewise the case of *B.P. Oil Inc.*, 256 NLRB 1107 (1981), cited by the Petitioner in support of its argument, is also clearly distinguishable from this case. *B.P. Oil* involved seven dispatchers who worked at a facility where multiple members of management worked -- including their direct supervision. Moreover, many of their activities that might have indicated some supervisory authority were dictated by established protocol -- such as overtime work being meted out on the basis of seniority. In the instant case, the plant managers operate their plants many miles from management and they appear free to assign overtime to any employee under them as they see fit. Indeed, there do not appear to be any set rules or policies impacting on the activities that lead me to find them to be supervisors.¹⁴

4. Secondary indicia:

My determination that the plant managers are supervisors is supported by several factors which set them apart from rank-and-file employees and that have been viewed by the Board as lending support to a finding of supervisory status grounded on some statutory indicia -- especially in situations where the statutory indicia, as here, centers around the supervisors' ability to responsibly direct the work force. These include the plant managers' attendance at the winter superintendents' conference;¹⁵ that they are responsible to verify employees time cards;¹⁶ that they are salaried rather than hourly employees;¹⁷ that, unlike hourly employees, they participate in the Employer's profit sharing program;¹⁸ and that they are provided with a company vehicle and credit card.¹⁹

C. *The Plant Operators:*

There are currently four plant operators. There is apparently much similarity between what plant operators do on a daily basis with respect to the operation of a plant and what the plant managers do. Indeed, it appears that the Employer views that plant operator's position as a proving ground for a plant manager's position. These are not, however, necessarily short term assignments, some individuals remaining in the classification for years. The major distinction

¹⁴ The Petitioner also cites two cases dealing with the evaluation of employees -- *Harborside Healthcare, Inc.*, 330 NLRB 1344 (2000) and *Elmhurst Extended Care*, 329 NLRB 535 (1999). I have not relied on the plant managers' informal evaluation of plant employees to reach the conclusion that they are supervisors.

¹⁵ See, e.g., *McClatchy Newspapers*, 307 NLRB 773 (1992) (attendance at management meetings).

¹⁶ See, e.g., *San Benito Health Foundation*, 318 NLRB 299 (1995) (approval of time cards and attendance at management meeting noted as supporting supervisory status); *Western Saw Manufacturers Inc.*, 155 NLRB 1323, 1329 fn. 11 (1965) (working foreman who initialed time cards and was only person directing work of employees during periods of time when upper management was not present at plant).

¹⁷ See, e.g., *American Commercial Barge Line Co.*, 337 NLRB at 1072, (pilots paid by salary whereas deck crews paid by the day); *Cherry Hill Textiles*, 309 NLRB 889 fn. 2 (1992) (individual found to be supervisor was salaried rather than hourly).

¹⁸ See, e.g., *Essbar Equipment Co.*, 315 NLRB 461 (1994) (individual in issue, unlike other field personnel, received bonuses); *McClatchy Newspapers*, supra, (receipt of bonuses based on waste reduction efficiency).

¹⁹ See, e.g., *Essbar Equipment Co.*, supra, (use of a company vehicle and credit card).

between plant operators and plant managers is that the former are described as having limited authority over employees. They receive greater direction from the operations manager and his assistant, and they will typically call them for help with respect to personnel, production and plant maintenance matters. Plant operators are hourly employees and only receive the benefits accorded hourly employees.

The Employer's president does not view the plant operators as supervisors and, although he apparently has no legal expertise, testified that he viewed them as eligible to vote in any representation election. When the issue of their status was formally raised at the hearing, however, Employer counsel declined to agree that they were employees, yet would not affirmatively take a position that they were supervisors. He instead was of the opinion that a determination on their status was up to me.

In *Bennett Industries*, 313 NLRB 1363 (1994), the Board found that when the employer refused to take a position on certain employees' supervisory status, the hearing officer did not err in refusing to allow the employer to introduce evidence on that issue. The Board reasoned that in cases where a party refuses to take a position, in order to effectuate the purposes of the Act, the Board should narrow the issues and limit its investigation to areas in dispute. The employer's unwillingness to take a position in *Bennett Industries* meant that there was no contention by any party that the disputed employees were in fact supervisors. Thus, the presumption of employee status was unrebutted because the burden of proving supervisory status lies with the party asserting such status.

Since neither party is contending plant operators are supervisors and, particularly in the absence of any conclusive evidence that they are in fact supervisors, I have placed them in the Unit.

D. *The Terminal Manager:*

As previously noted, Jerry Estep is the Terminal manager. He is salaried and has the same benefits as other salaried personnel. Other terminal employees are hourly. Their benefits are the same as the other hourly employees. Although Estep's office is in Mansfield, he is responsible to oversee both terminals, making the three or four-hour drive to Wheelersburg as needed. There is scant evidence of what he actually does throughout his workday and no evidence of what type of authority he may have over terminal employees.

While there may be some secondary indicia of supervisor status flowing from Estep being salaried, there is no evidence that he possesses any authority set forth in Section 2(11) of the Act. Although secondary indicia may serve as background evidence on the question of supervisory status, in the absence of Section 2(11) indicia, it will not alone support a finding of such status. See, *Training School of Vineland*, 332 NLRB 1412, 1413 fn. 3 (2000); *Chrome Deposit Corps*, 323 NLRB 961, 963 fn. 9 (1997).

As previously stated, the burden of establishing that an individual is a supervisor within the meaning of Section 2(11) of the Act rests on the party -- in this instance, the Employer -- who asserts supervisory status. Thus, the Employer's mere assertion that Estep is a supervisor within

the meaning of the Act, in lieu of the presentation of actual evidence on the point, results in my finding the Employer has not met its burden. In initial representation case proceedings, the failure of the party seeking to disenfranchise an employee on the basis of his/her supervisory status to meet its burden results in the employee being considered an eligible voter for purposes of the representation election. See, e.g., *Los Angeles Water and Power Employees' Association*, 340 NLRB No. 146 (2003). I therefore have included the classification of terminal manager in the unit description of eligible voters.

VI. The Remaining Employees

A. The Quality Control Employees:

As previously described, the Employer has a quality control department responsible for testing its product both at the point of production and where it is ultimately used. The Petitioner does not seek to include these employees in the unit and the Employer has not argued for their inclusion. There is little evidence of these employees' terms and conditions of employment; however, they are separately supervised, there is no evidence of interchange with other employees and they perform a unique function in the Employer's operations. In light of these facts, and in apparent agreement with the parties, I do not believe that they have such an overwhelming community of interest with other employees that they must be included in the Unit. See, *Lundy Packing Co.*, 314 NLRB 1042 (1994). I have therefore excluded them from the Unit.

B. The Maintenance Employees:

There are currently three maintenance employees. Neither party has indicated its position with respect to the unit placement of these individuals. The maintenance employees appear to often work side-by-side with plant employees when engaged in maintenance work. They receive their directions from the operations manager and therefore share supervision with a large number of unit employees. They are hourly employees and thus have the same benefits as unit employees. Like other unit employees, they are subject to being laid off during the winter shut down. As indicated by the recent transfer of a plant operator to become one of the maintenance employees, there is obviously interchange between maintenance employees and unit employees.

As stated by the Board in *The Boeing Company*, 337 NLRB 152, 153 (2001):

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. See, e.g., *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded* 128 NLRB F.3d 1181, 1185 fn. 2 (7th Cir. 1997). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. See, e.g., *Bartlett Collins Co.*, 334 NLRB 484 (2001) and *State*

Farm Mutual Automobile Insurance Co., 163 NLRB 677 (1967). In determining whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and frequency of contact and interchange with other employees; and functional integration. *Ore-Ida Foods*, 313 NLRB 1016 (1994), affd. 66 F.3d 328 (7th Cir. 1995)

In the instant case, due to the common supervision and benefits of maintenance employees and unit employees, maintenance employees' regular contact with unit employees, their interchange with unit employees and their functional integration into the Employer's operations, I conclude that although not specifically sought by the Petitioner, the smallest appropriate unit encompassing the petitioned-for employees must include the maintenance employees. I therefore have included them in the Unit.

C. The Scrap Employee:

As noted previously, the Employer also employs a scrap employee. The scrap employee is a once retired employee who was brought back to cut up and salvage presumably metal scrap. It is anticipated that he will be laid off at some point -- but it is unclear whether this is part of the normal winter lay off. He apparently performs his work at various locations. It is unclear if he works out of any particular location or who supervises him.

Although there is a dearth of information available to me, it appears that the scrap employee's work is such that he has nothing in common with the quality control employees and presumably retired from one of the Unit positions. Thus, were he not included in the Unit, there would be no other group of employees with which he might appropriately be included for purposes of collective-bargaining. In situations where there is a single employee, who if not included in a unit would have no other unit in which they could reasonably be included, the normal practice is to include the employee in the petitioned-for unit. See, e.g., *United Rentals, Inc.*, 341 NLRB No. 72, slip op. 2 at fn. 11 (2004) (although the record was sparse concerning the terms and conditions of one employee, because she would have been the only individual at that particular location unrepresented she was included in the unit); *Holiday Inns, Inc.*, 238 NLRB 1369, fn. 2 (1978) (while the petitioner did not seek to include an employee in unit, he was included because otherwise he could become the only unrepresented employee in that particular department). I have therefore included the position of scrap employee in the Unit. If he is laid off at the time of the election with no expectancy of recall, either party is free to challenge his vote on that basis and if it is determinative of the outcome of the election the matter may be handled in a post election proceeding.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this

Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 18, 18A, 18B, 18C and 18RA, A/W INTERNATIONAL UNION OF OPERATING ENGINEERS AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by December 21, 2004.

Dated at Cleveland, Ohio this 7th day of December 2004.

/s/ [Frederick J. Calatrello].

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8